



Procedures on Guidance

Requirements & Best Practices for Use of Guidance Documents



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This document provides information for Virginia agencies on when and how to use guidance documents and on possible alternatives to the use of guidance documents.

What qualifies as a guidance document?

The Virginia Code defines “guidance document” as “any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations.” It goes on to say that “documents that pertain only to the internal management of agencies” are not considered to be guidance documents (§ 2.2-4101).

Not every document that Virginia agencies issue counts as a guidance document that goes through a public comment process (§ 2.2-4002.1) and is subject to review by the Office of Regulatory Management (ORM) (Youngkin Executive Order 19). When you are deciding whether a particular document qualifies as a guidance document subject to ORM review, you should ask three questions:

- (1) Does the document relate to interpretation or implementation of a statute or the agency's regulations? If not, it does not meet the legal definition of a guidance document.
- (2) Does the document announce a generally applicable policy? If it relates only to a specific party (e.g., an email notice to a company) or a one-time transaction (e.g., notice of an upcoming meeting), it does not qualify as a guidance document.
- (3) Does the document apply to or affect anyone outside the agency (including other state agencies)? If a document applies exclusively to matters internal to the agency, it is not considered a guidance document. Agencies may, however, consider posting internal documents that may be of public interest on their websites (rather than the Virginia Regulatory Town Hall) for purposes of transparency.

If the answer to these three questions is “yes,” then the document qualifies as a guidance document for purpose of ORM review regardless of the form or it takes or how it is titled. Though it is impossible to provide a comprehensive list of materials that do or do not qualify as guidance documents, ORM has identified some classes of documents for which agencies might be unsure as to whether they qualify:

Is a Guidance Document	Is Not a Guidance Document¹
Document providing targeted processing times for agency permits	Non-regulatory informational materials (e.g., list of courses offered, list of qualified medical providers, user's manual, annual report, internal organizational chart)
Document that instructs other state agencies on how to administer a program	Financial analyses (e.g., the agency's annual budgetary projections)
Email, memo, circular, announcement, or other communication describing a policy affecting regulated parties	Materials not authored by agency (e.g., list of court decisions, bibliographies)
Document that describes how a state agency applies federal regulatory requirements	Agreements with specific parties (e.g., contracts, MOUs)
	Promotional materials (e.g., newsletters, customer notices)
	Administrative announcements (e.g., hours of operation)
	Documents that solely concern internal agency matters (e.g., vacation policy)
	Press releases
	Forms ²

¹ Though these do not qualify as guidance documents, many of them may be of public interest and may be good candidates for listing on the agency's website and/or posting as “general notices” on the Virginia Regulatory Town Hall.

² Forms that regulated parties are required to complete must be included in the corresponding regulation and cannot be issued as guidance documents. 1 VAC 7-10-180.

If your agency has questions about whether a particular document is best classified as a regulation, guidance document, or something else, please contact ORM and, as applicable, the Office of the Attorney General (OAG). ORM will work with you to decide how the document should be classified and whether it should be submitted for ORM review. OAG can provide legal guidance on whether the document is subject to the Administrative Process Act and what procedures your agency should follow in issuing it.

Can an agency set requirements via guidance documents?

No. Only statutes and regulations have the force of law. (Virginia Code § 2.2-4101) Guidance documents cannot be enforced by the agency.

Agencies should also avoid setting requirements via guidance document for reasons of transparency. The Administrative Process Act (APA) includes various procedures that create an open and accountable process for the development of regulations. It is important that any document imposing a requirement go through this process. In addition, the Virginia Administrative Code (VAC) compiles all regulations in a single place. It is far easier for the public to find regulatory requirements in the VAC than to sort through an agency's guidance documents on its website or on Town Hall.

In no instance should an agency set or modify a *fee* (e.g., licensing fee, exam fee) via a guidance document rather than a regulation. An agency may, however, disclose a schedule or list of potential *penalties or fines* (including ranges) in order to provide transparency in an enforcement program. This is a permissible use of a guidance document, since the agency is simply announcing in advance how it will use its discretion rather than setting a new requirement. Such announcements should always occur via either regulation or guidance document, however, and should not be announced via a communication that does not undergo ORM review or receive public comment.

How should an agency proceed if it needs to act quickly?

As noted above, it is perfectly acceptable for an agency to *describe* a statutory or regulatory requirement via a guidance document or general notice. In that light, if an agency needs to quickly communicate a change in law, such as a new requirement imposed by the General Assembly, it is perfectly permissible to use a guidance document or general notice for that purpose.

If an agency needs to create *new requirements* that go beyond what is contained in statutes or regulations, however, it should not use a guidance document. If it needs to act quickly, it should instead consider the following options for promulgating regulations in short order:

Type of Regulatory Action	Legal Authority	Key Characteristics of the Regulatory Process
Emergency	APA § 2.2-4011 <ul style="list-style-type: none"> Office of Attorney General (OAG) and Governor's Office must approve existence of emergency (unless statute mandates promulgation of regulation in 280 or fewer days) 	<ul style="list-style-type: none"> Includes only one step rather than three (NOIRA, proposed, final) Effective immediately upon submission to Registrar Review by Department of Planning and Budget (DPB) is limited to 21 days Effective only for 18 months (renewable for 6 months), but this allows time to adopt a permanent regulation
Exempt	APA §§ 2.2-4002, 4006 <ul style="list-style-type: none"> Any non-discretionary regulation mandated by federal or state statute, federal regulation, or court order qualifies as exempt (§2.2-4006(A)(4)) Agencies often have other exemptions they can invoke	<ul style="list-style-type: none"> Includes only one step rather than three (NOIRA, proposed, final) Only reviewed by OAG, Office of Regulatory Management (ORM), and the Governor's Office
Fast-Track	APA § 2.2-4012.1 <ul style="list-style-type: none"> Governor must concur that regulatory action is "non-controversial" 	<ul style="list-style-type: none"> Includes only one step rather than three (NOIRA, proposed, final) DPB review is limited to 40 days (10 days to certify use of fast-track and another 30 days to review)

ORM is aware that, in the past, the regulatory process would often take months or even years to complete, in large measure as a result of extensive delays in the executive review process. A major part of ORM's mission is reducing those review times, and it has already reduced the average review time in the Governor's Office from 241 days to 12 days (as of the date of this memorandum).

Agencies will, of course, need to build in time for public comment and publication in the Registrar (as is also true of guidance documents), as appropriate. But the overall process could theoretically be completed in a matter of 3–4 months in the case of a fast-track action and an even shorter period of time in the case of an emergency or exempt regulation.

Of course, in cases in which it is operating under a compressed timeframe, the agency should communicate that information to (as applicable) OAG, DPB, the relevant Secretary, and ORM as soon as possible so that they can plan accordingly.

What is the ORM process for review of guidance documents?

Before an agency issues a new guidance document or modifies an existing one, it should upload the document to the Virginia Regulatory Town Hall Forum that was created for ORM review. Agencies should not upload new or revised guidance documents to Town Hall without creating a forum, which ensures ORM review. Once ORM has completed its review, the agency should submit the guidance document to the Registrar. Once submitted, the guidance document will undergo a 30-day public comment period.

After the comment period has ended, the agency is free to finalize the guidance document if it did not make any additional changes. If it did make changes, it should resubmit the document for a second round of ORM review. For the time being, the agency should resubmit the revised document and the updated ORM Economic Review Form by emailing them to ORM Deputy Director Reeve Bull (reeve.bull@governor.virginia.gov). Future changes will modify the Town Hall submission forum to allow the agency to resubmit a final revised guidance document for ORM review.